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AND SPORT IN THE RECENT JURISPRUDENCE
OF THE COURT OF JUSTICE OF THE EUROPEAN
UNION**

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COMPETITION, FREE MOVEMENT OF PEOPLE AND SPORT IN THE RECENT JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Gregory Adam, Attorney at Law, US

Abstract: The present paper takes into consideration three sentences from the Court of Justice of the European Union (CJEU). The sentences were decided on 21 December 2023, calling into question some always debatable and constantly evolving topics at the European level. We are referring to sports policies, competition, professional footballers and free movement of people. These are preliminary rulings that deal with topics that in the rulings of the cases Superlega, ISU, SA Royal Antwerp FC and Lietuvos notarų rūmai and others of 18 January 2024, bring together jurisprudential points of the past as well as new references regarding competition and the free movement of people. Topics that will be discussed in the near future by the

jurisprudence of the CJEU given that sport in “connection” to competition policies and the free movement of people up to now has a jurisprudence history that is approximately non-existent and/or collateral with other matters. The paper aims to develop what exactly the CJEU decided and what it brought about as a development in European integration in the professional and non-amateur sports sector.

Keywords: competition; free movement of persons; CJEU; EU law; values; principles of the EU; sport; professional football; sport of economic activity; preliminary ruling; art. 165 TFEU; art. 45 TFEU; European sports model.

INTRODUCTION

The Court of Justice of the European Union (CJEU)¹ has taken a position on matters of competition, free movement of persons within the territory of the EU and in particular in the sports sector, focusing on EU law in general as well as

¹The present work is updated until January 2024.

to the European sporting model. The past is difficult to define, the present can already be seen from these rulings, and the future is still obscure to define given that the sports topic remains for the next few years an issue that cannot be examined alone but together with other policies of the EU such as for example of competition and free movement of people.

In particular, we refer to an investigation with personal reflections which will be carried out on the relevant sentences all decided on 21 December 2023: European Superleague Company (Walker, Folkman, 2023; Bodoni, 2023)², SA Royal Antwerp FC (Íñiguez, Íñiguez, 2024)³, the appeal through the Court's ruling in International Skating Union v. Commission (Lichtenberg, 2024)⁴ and recently the Lietuvos notarų rūmai and others case of 18 January 2024⁵.

²CJEU, C-333/21, European Superleague Company of 21 December 2023, ECLI:EU:C:2023:1011, not yet published.

³CJEU, C-680/21, SA Royal Antwerp FC of 21 December 2023, ECLI:EU:C:2023:188, not yet published.

⁴CJEU, C-124/21 P, International Skating Union v. Commission of 21 December 2023, ECLI:EU:C:2023:1012, not yet published.

⁵CJEU, C-128/21, Lietuvos notarų rūmai and others of 18 January 2024, ECLI:EU:C:2024:49, not yet published.

These are sentences that bring forward arguments that are not only pure law of the EU but also of other EU policies as will be seen in next paragraphs.

EUROPEAN SPORTS MODEL AND INTERPRETATION OF ART. 165 TFEU

With the accumulated “twin” sentences just exposed and decided on 21 December 2023, the CJEU avoided taking a precise position regarding the European sports model and did not interpret Art. 165 TFEU (Blanke, Mangiamelli, 2021). The CJEU followed a particular, not so orthodox approach in the normative and interpretation as can also be seen from the conclusions of the Advocate General Rantos in the Super League and ISU case, taking into consideration that sport, as foreseen by the treaties, has a constitutional nature. Already Art. 165 TFEU is part of the constitutionality of the European sports model which includes a series of elements of a form where professional, hobby and amateur sport allows open competitions which are accessible according to a transparent system where promotion is based on a balance that also favors solidarity

of a financial nature. Within this framework, a system of events and activities is redistributed at lower levels of sport and Art. 165 TFEU thus represents a precise basis of the provisions that generally come from Articles 101 and 102 TFEU (Blanke, Mangiamelli, 2021), acting as paradigms for the interpretation of competition rules. It is a horizontal competition that is oriented to the policies of the EU.

The European sports model has a constitutional basis according to Art. 165 TFEU where the CJEU itself characterizes as:

“(...) the European sporting model is never mentioned in any of the three rulings (...) despite a considerable part of the defense arguments of the federations involved having leveraged precisely this model to support the legitimacy of the own system of prior authorization, in reality neither the Superlega affair nor the ISU affair concerned the so-called European sports model (...)”⁶.

Within this silence the CJEU did not take a concrete position since both sides of all the causes followed the milder path. The Advocate General Rantos reiterated that:

“(...) model European sports player represents more of an

⁶CJEU, C-333/21, European Superleague Company of 15 December 2022, ECLI:EU:C:2022:933, not yet published, par. 99.

ideological-political icon than a defined and concrete regulatory objective (...)”⁷.

Article 165 TFEU was of important consideration for the Advocate General but not so much for the CJEU. Because, as we have seen, the judges declared that:

“(...) the combined provisions of Articles 6 TEU and 165 TFEU allow us to state that the authors of the Treaties intended to confer on the Union a supporting competence, allowing it to pursue not a “policy”, as envisaged by other provisions of the TFEU, but an “action” in some specific sectors, including sport (...). These provisions constitute a legal basis which authorizes the Union to exercise this support competence, under the conditions and within the limits established by them, providing, among other things, Art. 165, par. 4, first indent, TFEU, the exclusion of any harmonization of legislative and regulatory provisions adopted at national level⁸ (...) as result from the insertion of Art. 165 TFEU in Part Three of the Treaty, dedicated to “internal policies and actions of the Union”, and not in Part One of this treaty, which contains provisions of principle, including,

⁷CJEU, C-333/21, European Superleague Company of 15 December 2022, ECLI:EU:C:2022:933, op. cit.

⁸CJEU, C-333/21, European Superleague Company of 15 December 2022, op. cit., par. 99.

in Title II, “Provisions of general scope”, relating, inter alia, the promotion of a high level of employment, the guarantee of adequate social protection, the fight against any discrimination, the protection of the environment and the protection of consumers. This article does not constitute a general horizontal provision (...)⁹ although the institutions of the Union must take into account the different elements and objectives listed in Art. 165 TFEU when they adopt, on the basis of that article and according to the conditions established therein, incentive measures or recommendations in the sector of sport. These different elements and objectives, as well as such incentive measures and recommendations must not be integrated or taken into consideration in a binding way in the application of the rules on the free movement of people, services and capital (Articles 45, 49, 56 and 63 TFEU) and on the competition rules (Articles 101 and 102 TFEU) (...) nor should Article 165 TFEU be regarded as a special rule which exempts sport from all or some of the other provisions of primary Union law which may apply to it or which requires special treatment for sport in the context of the application of that rule (...)”¹⁰.

⁹CJEU, C-333/21, European Superleague Company of 15 December 2022, op. cit., par. 100.

¹⁰CJEU, C-333/21, European Superleague Company of 15 December 2022,

As is immediately clear from the firm points of the judges, it is noted that even after the entry of the TFEU, sports federations are not included in the CJEU according to what Art. 165 TFEU expresses allowing the justification of regulating sport in a restrictive manner towards a free form of competition.

WHAT ARE THE SPORTING RULES?

By carefully reading the content and paragraphs of the three sentences exposed, we note yet another common element, that of purely sporting rules. In particular, the CJEU, in relation to economic activities (Bergqvist, 2021)¹¹ that sport uses and which leads to various channels that are involved, is also subject to rules for the law of the EU that regulates such activity. Some rules are specific, particular and exclusively based on non-economic reasons concerning other issues for sport as unrelated to economic activities. These rules also exclude foreign players and teams that

op. cit., par. 101.

¹¹CJEU, C-306/20, Visma Enterprise of 18 November 2021, ECLI:EU:C:2021:935, not yet published, parr. 51-55.

have internal organization and nationality as well as those relating to criteria where sports federations select athletes who are destined to identify the relevant competitions. The CJEU took into consideration by way of example the use of the expression “in particular” underlining that:

“(...) the rules adopted by sports associations to regulate paid work or the provision of services by professional or semi-professional players and, more generally, those rules which, while not formally regulating such work or provision of services, have an indirect impact on them, may fall within the scope of application of the rules on free movement and competition (...)”¹².

Moreover, the CJEU through the sentences of 21 December 2023 did not want to take a position of returning to the past or to the jurisprudence of 2006 as can be seen in the Meca Medina and Majcen v. Commission case of 18 July 2006 (Weatherill, 2013)¹³, where it was stated that:

“(...) the Court made an error of law for having “considered that the circumstance that a purely sporting

¹²CJEU, C-333/21, European Superleague Company of 15 December 2022, op. cit., par. 102.

¹³CJEU, C-519/04 P, Meca Medina and Majcen v. Commission of 18 July 2006, ECLI:EU:C:492, I-06991.

regulation is extraneous to economic activity, with the consequence that this regulation does not fall within the scope of application of Articles 39 EC and 49 EC, also means that it is extraneous to the economic relationships that affect competition, with the consequence that it does not even fall within the scope of application of Articles 81 EC and 82 EC (...)"¹⁴.

In the same spirit we note that the European Commission in the White Paper on sport of 2007 took into consideration:

"(...) whether a certain sporting rule is compatible with EU competition rules can only be assessed on a case-by-case basis, as recently confirmed by the European Court of Justice in its ruling on the Meca Medina case. The Court provided clarification regarding the effects of EU law on sports rules, rejecting the notion of "purely sporting rules" as irrelevant to the question of the applicability of EU competition rules to the sports sector (...)"¹⁵.

It is specifically a considered structure that autonomously marks the sport organizations to a pyramidal architecture where the rules of the Union for sport apply and evaluate

¹⁴CJEU, C-519/04 P, Meca Medina and Majcen v. Commission of 18 July 2006, op. cit., par. 32.

¹⁵White Paper-White Paper on Sport {SEC(2007) 932} {SEC(2007) 934} {SEC(2007) 935} {SEC(2007) 936}, COM/2007/0391 final.

on a case-by-case basis not all the rules of the EU but the general obligations imposed by the same EU.

More in the Olympique Lyonnais SASP v. Bernard Newcastle UFG case of 16 March 2010 (Lindholm, 2010)¹⁶ the CJEU attempted to compensate through the payment of compensation for the training of a footballer for a contract necessary for the development of his career, thus responding to the need to encourage through the training of young people, the sporting rules by imposing the payment of an indemnity to be able to leave the relevant club which restricted the exercise of freedom of movement according to Art. 45 TFEU (Blanke, Mangiamelli, 2021).

The concept of purely sporting rules was also considered and discussed in the Walrave and Koch ruling (Parrish, 2013)¹⁷ which took into consideration purely sporting rules interpreted as rules which are adopted not for economic reasons and which are relevant to sport and referred to the

¹⁶CJEU, C-325/08, Olympique Lyonnais SASP v. Bernard Newcastle UFG of 16 March 2010, ECLI:EU:C:2010:143, I-2177.

¹⁷CJEU, C-36/74, B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo of 12 December 1974, ECLI:EU:C:1974:140, I-1405.

CJEU as purely sporting rules. Within this spirit, in the Superlega case, the CJEU stated that these are: “rules extraneous to any economic activity”. Rules adopted “to paid work or the performance of services”, and also rules which “whilst not formally governing that work or the performance of services, have an indirect impact thereon”¹⁸. Economic activity is also considered and involved with the high level of sport where each rule is like “more” to a purely sporting rule having an indirect impact towards an economic dimension of the relevant sporting activity. Thus the economic nature that reaches national sports representations is considered by imagining that the ban on foreign footballers who are famous and well-publicized citizens of a Member State of the EU must be part of the national football team of another Member State of the EU has not importance for the free movement of services by this type of player.

The references to purely sporting rules are evident to the rules which consider purely sporting rules in the sense

¹⁸CJEU, C-36/74, B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo, op. cit., par. 85.

considered by the CJEU itself. In particular, in the Superlega ruling and in the SA Royal Antwerp FC ruling, it was stated that:

“(...) the rules under discussion in the two rulings do not fall within the concept of purely sporting rules since, although they do not formally regulate the working or performance conditions of services of players or the conditions of exercise of economic activity by professional football clubs, such rules must be considered to have a direct influence on such work, on such provision of services or on the exercise of such economic activity, since they affect necessarily on the possibility of participation of players and clubs in the competitions in question (...). Nothing is said in this regard in the ISU ruling (...)”¹⁹.

SOME RESTRICTIONS OF AN OBJECTIVE NATURE

As can be seen from the Superlega case, the application of European competition rules qualifies the system of prior authorization from UEFA as a type of restriction of competition of an objective nature given that this system is

¹⁹CJEU, C-680/21, SA Royal Antwerp FC of 21 December 2023, op. cit.

devoid of a general framework of rules and criteria which are indispensable for guaranteeing an authorized power of the federations which they exercise in an objective, transparent, proportionate and non-discriminatory manner. These are similar considerations that play into a system of prior authorization that is noted in the ISU case. The European judges did not specifically exclude international football competitions and under conditions they had to do with the correct functioning of the market and the organisation, commercialization of competitions on their own territory of the EU giving basis to the general idea that it is legitimate for sports federations to adopt rules that have to do with prior approval of competitions and thus justify the FIFA and UEFA system where through prior authorization it falls within legitimate objectives and which guarantee and respect the principles, values, rules of the game that are part of a professional sport such as football. In particular, the CJEU considered that this type of system is governed by objective, transparent, precise, proportionate criteria and that it reveals a purpose of this system and gives UEFA and FIFA the relative power to control and authorize the relevant conditions of access to a

market that concerns every company of a competitive nature as well as to evaluate the degree of competition that exists in a market and the conditions that exercise this potential type of competition.

Within this context, the CJEU continues and underlines that:

“(...) the system of prior authorization by UEFA and FIFA allows, by its very nature, if not to exclude from this market any competing company, even equally efficient ones, at least to limit the creation and the marketing “of alternative or new competitions in terms of format or content” (...). UEFA and FIFA completely deprive professional football clubs and players of the possibility of participating in such competitions, even if they could, for example, offer an innovative format respecting all the principles, values and rules of the game that are the basis of this sport (...) completely deprive spectators and viewers of the possibility of attending such competitions or following their broadcast (...)”²⁰.

The basis of the statements just cited are tools for future rulings on the matter and are based on economic competition which constitutes a differentiated product.

²⁰CJEU, C-333/21, European Superleague Company of 21 December 2023, op. cit., par. 176.

The economic competition between sporting events are points that differentiate the product that respects that offered by the incumbent. This type of differentiation also concerns the sporting event such as specific game rules, the effective time, number of referees, etc.

The CJEU considered that the system of prior authorization of FIFA and UEFA has a restrictive nature of competition which is lacking for a competing company, efficient in the relative marketing and organization of new competitions in terms of format and relative content. Thus it is stated that each new type of competition has the objective of respecting the principles, values and rules of each game which are the basis of sport whether it is football or not. The principles and values are the basis of respect for the rules of the game which has a generic nature. But no position has been taken regarding the rules of the game of FIFA and UEFA. These are rules that are not taken into consideration. Rules that do not affect the ruling of the judges. We are understanding that the internal rules of football are part of an identification of rules that contribute to the definition of the concept of the game and of football but cannot be modified in any way. We are also taking into

account the rules that prohibit players from touching the ball with their hands except the goalkeeper. Within this context we must also consider other sports that use other technical rules, for example those that go beyond the logic of football. What happens and what is taken into consideration for these sports?

The objective restriction and prior authorization of the rules of FIFA and UEFA are also taken into consideration in old sentences such as in the Wouters and others²¹ and Meca Medina and Majcen and Ordem dos Técnicos Oficiais de Contas cases²². These are sentences that also concerned agreements, decisions that had to do with rules that are adopted by an association such as a professional association and/or sports association pursuing certain objectives of an ethical nature, of general principles regulating the related professional activities. Thus, no restrictions per object apply. Not every agreement between companies is limited to the freedom of action of the companies that are part of

²¹CJEU, C-309/99, Wouters and others of 19 February 2002, ECLI:EU:C:2002:390, I-01577.

²²CJEU, C-1/12, Ordem dos Técnicos Oficiais de Contas of 28 February 2013, ECLI:EU:C:2013:127, published in the electronic Reports of the cases.

an agreement which necessarily falls within the relevant prohibition which is provided for by Art. 101, par. 1 TFEU²³. Such article takes in consideration the economic and legal context in which any agreement that pursues the legitimate objectives of any public interest is part,

²³CJEU, C-128/21, Lietuvos notarų rūmai and others of 18 January 2024, op. cit., par. 72: “(...) it is clear from the Court’s case-law that other factors, relating in particular to the composition of the governing bodies of the professional organisation in question, its method of operation, its relations with the public authorities and the framework of its regulatory or decision-making powers, are relevant for the purposes of determining whether such an organisation must be regarded as an association of undertakings within the meaning of Article 101 TFEU or as a public authority (...)”; par. 89: “(...) it is important to emphasise that, in the context of the procedure under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court, the Court’s role is limited to interpreting the provisions of EU law on which it is asked, in this case Article 101(1) TFEU (...); par. 97: “(...) , it is apparent from the Court’s settled case-law that any agreement between undertakings or any decision by an association of undertakings which limits the freedom of action of the undertakings party to that agreement or subject to compliance with that decision does not necessarily fall within the prohibition laid down in Article 101(1) TFEU. An examination of the economic and legal context in which some of those agreements and decisions are made may lead to the conclusion, first, that they are justified

necessarily proportionate to the relevant specific means used to pursue such objectives. Therefore, the CJEU made use of the previous jurisprudence arguing that:

“(...) from the MOTOE²⁴ jurisprudence (...) it appears, albeit implicitly, but necessarily, that the jurisprudence referred to above does not apply in the presence of conduct which, regardless of whether it originates or not by a professional or sporting association and which legitimate objectives of public interest can be invoked in support, by

by the pursuit of one or more legitimate objectives in the general interest which are not, in themselves, anticompetitive in nature and, second, that the specific means used to achieve those objectives are not, in themselves, anticompetitive, that the specific means used to pursue those objectives are genuinely necessary for that purpose and, third, that even if those means are found to have the inherent effect of restricting or distorting, at least potentially, competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition. That case-law may apply, in particular, to agreements or decisions taking the form of rules adopted by an association such as a professional association or a sports association, with a view to pursuing certain ethical or deontological objectives and, more generally, to regulating the exercise of a professional activity, if the association concerned demonstrates that the conditions for the exercise of the activity in question are fulfilled (judgment of 21 December 2023, Royal Antwerp Football Club, C-680/21, EU:C:2023:1010, paragraph 113 and the case-law cited) (...”).

²⁴CJEU, C-49/07, MOTOA of 1st July 2008, ECLI:EU:C:2008:376, I-04863.

their very nature violate Art. 102 TFEU (...)²⁵; (...) b) given that the absence of a subjective intention to prevent, limit or distort competition as well as the pursuit of potentially legitimate objectives are not decisive even for the purposes of the application of Art. 101, par. 1, TFEU and, furthermore, Articles 101 and 102 TFEU must be interpreted in a coherent way. It follows that the jurisprudence under discussion does not even apply to conduct which, far from simply having the intrinsic “effect” of restricting, at least potentially, competition, reveals a degree of such a high level of prejudice with respect to such competition as to justify the finding that such behavior has as its very “object” the prevention, restriction or distortion of competition (...)"²⁶.

These are passages that emerge from the particular reference to sport. We understand this position given that the judges in the MOTOE case for example and via paragraph 53 did not consider the rules they used in the Wouters/Meca Medina/OTOC cases i.e. objective restrictions. We can speak for a new principle that in all the

²⁵CJEU, C-333/21, European Superleague Company of 21 December 2023, op. cit., par. 185.

²⁶CJEU, C-333/21, European Superleague Company of 21 December 2023, op. cit., par. 186.

new sentences of 2023 there is no precise reference of a unique nature. In the Wouters/Meca Medina/OTOC jurisprudence, the non-application to objective restrictions qualifies the restrictive agreement by object in a legal, economic context which is also included in other cases²⁷.

Since the relevant restrictive agreements of an objective nature are excluded, as we noted in the Wouters/Meca-Medina/OTOC cases, these agreements did not take into consideration the prohibition of Art. 101, par. 1 TFEU as well as the conditions provided for by Art. 101, par. 3 TFEU. Conditions which are restrictive and which recall exceptional cases of objective restriction and which benefit from the relative exemption of ex Art. 101, par. 3 TFEU (Blanke, Mangiamelli, 2021).

The conclusions and the position held by the CJEU relating to the restriction of competition of an objective nature, i.e. for the purpose of sports federations do not limit in a

²⁷CJEU, C-67/13 P, CB v. Commission of 11 September 2004, ECLI:EU:C:2004:2204, published in the electronic Reports of the cases, par. 53. C-179/16, F. Hoffmann-La Roche and others of 23 January 2018, ECLI:EU:C:2018:26, published in the electronic Reports of the cases, par. 79.

general way the specificity of sport and the values of Art. 165 TFEU but demonstrate through convincing evidence the restrictive measure that satisfies the conditions that are foreseen by Art. 101, par. 3 TFEU (Blanke, Mangiamelli, 2021). The prior authorization of the FIFA/UEFA system according to the CJEU:

“(...) with reference to the first condition (efficiency increases): FIFA/UEFA must demonstrate that such efficiency do not correspond to the advantages that FIFA and UEFA can derive from their system of prior authorization in the context of their economic activity, but correspond to objective and appreciable advantages that their system allows them to obtain in the various sectors or markets involved. Furthermore, for this first condition to be considered satisfied, not only must the actual existence and extent of such efficiency increases be demonstrated, but such increases must also be quantified, demonstrating how and when such increases will be achieved and, finally, when they are capable of compensating for the disadvantages caused by the contested agreement, decision or practice in competition matters; -with reference to the second condition (reserving a fair share of the benefits to users): FIFA/UEFA will have to demonstrate that their system of prior

authorization and related sanctions is suitable to have a favorable impact on the different categories of users, i.e. the football federations national teams, professional or amateur clubs, professional or amateur players, young footballers and, more generally, consumers, be they spectators or television viewers (...) although these rules may appear legitimate, in terms of their principle, since they contribute to guarantee respect for the principles, values and rules of the game on which professional football is based, in particular the open and meritocratic character of the competitions in question, and guaranteeing a certain form of "redistribution of solidarity" within football. The existence of such objectives, however laudable they may be, does not exempt the federations that have adopted such rules from the obligation to demonstrate, before the national judge, that the pursuit of such objectives translates into actual and quantifiable efficiency gains, from the one hand, and that they compensate for the competitive disadvantages caused by the rules at issue in the main proceedings, on the other; -with reference to the fourth condition (non-elimination of competition): the referring judge must take into account the fact that there is no regulatory framework for the rules on prior approval, participation and sanctions that provides substantive criteria and

detailed procedural rules suitable for guarantee its transparency, objectivity, precision and non-discrimination. Furthermore, according to the Court of Justice, such a situation is capable of allowing FIFA and UEFA to prevent any competition on the market for the organization and marketing of football competitions between clubs on the territory of the Union (...)"²⁸.

EFFECTIVE JURISDICTION, EVALUATION AND SPORTS ARBITRATION

Through the ISU ruling, the restriction of the prior authorization system and the disproportionate nature of the sanctions in line with the old MOTOE jurisprudence makes as an accomplice the conclusions that arrive and which appear to be superimposable on the Superlega case, marking the related analysis which from the point of view of compatibility with the sports arbitration system, by submitting cases to the Tribunal Arbitral du Sport (TAS) in Lausanne with the relevant principles of European Union law and with the effective jurisdictional assessment, are

²⁸CJEU, C-333/21, European Superleague Company of 21 December 2023, op. cit., par. 187-188.

topics under discussion.

The arbitration mechanism before the CAS according to the ISU case was capable of giving anti-competitive points in the system of prior authorization where the Court took into consideration and did not correctly evaluate the exclusive and mandatory nature of the CAS arbitration and as provided for in the ISU case. If this were the case, individuals had the right to protect their rights by turning to national judges requesting that compensation for damages is normal after the relevant complaint to the commission and the competition authorities but in this case at national level.

According to the relevant jurisprudence of the CJEU²⁹ it is noted that an individual can stipulate an agreement, which he can then submit with precise terms the disputes that concern him to the relevant arbitration body, while the national judge has jurisdiction to rule on disputes where national law applies and to related needs where the effectiveness of the arbitration proceedings justifies the

²⁹C-126/97, Eco Swiss of 1st June 1999, ECLI:EU:C:1999:269, I-03055, par. 35. C-168/05, Mostaza Claro of 26 October 2006, ECLI:EU:C:2006:675, I-10421, par. 34.

limitation of the judicial review evaluation of arbitration awards. This jurisdictional control should check compliance with the laws and fundamental provisions that have to do with the public order of the Union as noted from Articles 101 and 102 TFEU (Blanke, Mangiamelli, 2021). An arbitration mechanism proposed by a private entity, such as for example by an international sports association and an athlete, has the right to such a mechanism without prejudice to the protection of the rights that the subjects derive from the legal effect of the law of the EU. An effect that respects Articles 101 and 102 TFEU and guarantees this mechanism by national rules which are related to judicial remedies. This is a relative autonomy enjoyed by the sports federations which can allow the approval of rules governing the competitions, the functioning and the relative participation of the athletes, without being understood as an effect of such rules, where the federations can limit the relative exercise of the rights and freedoms that are granted to individuals and are pursuant to the rules of EU law and in particular to Articles 101, 102 TFEU. Rules where the system through prior authorization and admissibility, as we noted in the ISU case, are subject to the

relevant effective jurisdictional assessment.

The discussion in the ISU case is relevant to the requirements that an arbitration mechanism meets and considered to be compatible with the principles, values and articles of the TFEU and the judicial system of the EU. Limiting the control of the CJEU through arbitral awards does not mean that it remains without effective control. The mandatory jurisdiction in favor of the arbitral body should check the truthfulness that the awards comply with the public order of the EU and falling within the provisions of Articles 101 and 102 TFEU and to a preliminary ruling of the CJEU according to Art. 267 TFEU (Blanke, Mangiamelli, 2021). These “requirements” cannot be replaced by other remedies that individuals may have in their hands such as for example actions for compensation for damages, reporting to the European Commission and/or to the competition authorities and/or of being superseded by a reference of legitimate reasons that are connected to the relevant characteristics that are specific to the sport.

These principles certainly recall the case under investigation: ISU where the European Commission itself established that:

“(...) the ISU had violated Art. 101, par. 1 TFEU (art. 1 of the decision) and, on the other hand, the ISU was required to put an end to the violation and refrain from repeating any act or behavior having an equivalent object or effect”³⁰.

Moreover, it must be read in the light of points 338 to 342 of the Commission decision that the measures that the ISU was required to adopt comply with the obligation to put an end to the infringement. The ISU could, in essence, put an end to the infringement while maintaining its system of prior authorization only if it introduces substantial changes not only to the rules on prior authorization, but also to its arbitration rules. In the event that the ISU has not confirmed what was established by Art. 2 of the decision, would have faced a daily late payment penalty of an amount equivalent to 5% of its daily turnover³¹.

The annulment after the ruling of the Court and the ISU put an end to the infringement and modifies the arbitration rules while maintaining the system of prior authorization according to Articles 2 and 4 of the relevant commission

³⁰Par. 2 of the decision.

³¹Par. 4 of the decision.

decision thus allowing full operation. In particular, the ISU has modified its system with prior authorization and according to Art. 101, par. 1 TFEU and the related arbitration rules. Thus it is specified that:

“(...) the arbitration rules of the ISU which are the subject of the dispute are (only) those which concern disputes which may arise in the context of economic activities consisting a) in seeking to organize and market international events of speed skating and b) in seeking to take part in such competitions as a professional athlete. These arbitration rules apply (...) to disputes relating to the pursuit of a sport as an economic activity and, on this basis, fall under Union competition law. Therefore, such rules must comply with Union competition law to the extent that they are implemented in the territory in which the EU and TFEU treaties apply, regardless of where the bodies that adopted them are established (...)”³².

The ISU arbitration rules come into play not already to the extent that they subject the first instance control of the decisions issued by the ISU to the CAS, but only to the extent that they subordinate the control of the sentences pronounced by the CAS and the last instance review of the

³²CJEU, C-124/21 P, International Skating Union v. Commission of 21 December 2023, op. cit. parr. 189-190.

ISU decisions before the Swiss Federal Court (TFS), i.e. a court of a third state³³.

The effect of the ruling of ISU represents and modifies the rules which are exclusively and obligatory for the CAS to resolve disputes concerning the organization of a sporting competition, third parties and sanctions inflicted on athletes who are part of a competition which is not authorized according to the rules that apply to a territory where the rules are of the EU, i.e. a Member State of the EU. For the CJEU, the ISU rules in the sector of arbitrability of disputes represents in fact the judicial control. This ensures to the Tribunal Fédéral Suisse (TFS) the CAS awards that are not considered effective and do not evaluate the compatibility between awards with public order which also includes competition rules. Thus one could not knock on the door of the CJEU according to Art. 267 TFEU i.e. preliminary ruling modifying thus the ISU the rules without abolishing the system of the TAS in this type of disputes. The ISU introduced the possibility of appealing to the ordinary courts of one of the Member States of the EU

³³CJEU, C-124/21 P, International Skating Union v. Commission of 21 December 2023, op. cit., par. 191.

when a person has decided to proceed with an arbitration before the CAS, thus linking the effective nature which has to do with the judicial control of the TFS in its entirety.

THE EFFECTS OF THE ISU RULING ON SPORTS JUSTICE AT AN INTERNATIONAL LEVEL

As we understood from the previous paragraphs and especially from paragraph 189 of ISU case the CJEU stated that the arbitration rules concern two types of disputes. They have their own meaning, for the law of the EU, given that they are disputes which have to do with sport with an economic impact. Paragraph 190 of the same ruling does not include other types of disputes such as those relating to sport within the scope of application of EU law.

The CJEU states that the exercise of sport is an economic activity within its territory of the EU and is subject to European rules. The related disputes at the CAS ensure effective judicial control as well as the possibility that the judicial body carries out this type of control i.e. the obligation, possibility of a preliminary ruling to the CJEU according to Art. 267 TFEU. If this were the case, the ISU

ruling has also extended its effects beyond disputes relating to the refusal to authorize sanctions to athletes who have participated in a related competition which is not authorised.

The relevant measures implementing the TAS arbitration system comply with the relevant indications where the CJEU in relation to judicial review is important outside the indications of the CJEU³⁴ and especially in the area of preliminary ruling.

Arriving at this point we must make a distinction between the possibility of reviewing the legitimacy of the TFS of a CAS award according to the rules that have to do with European public order and above all with Articles 101, 102 TFEU and the obligation, possibility for the TFS via preliminary ruling to contact the CJEU.

The notion of Swiss public order having to do with the TFS and the CAS award, despite being shown as delicate, imprecise and obscure, does not appear to be addressed. This is an evolution of the jurisprudence of the TFS where

³⁴CJEU, C-600/23, Royal Football Club Seraing v. FIFA, UEFA e URBSFA Royal Football Club Seraing v. FIFA, UEFA and URBSFA of 13 October 2023, not other information available.

the concept of Swiss public order allows in the context of judicial control a relative consideration of the rules of European public order according to the light of the conclusions also reached on the subject of the European Court of Human Rights in the Semenya v. Switzerland case of 11 July 2023 (Shinohara, 2023).

Regarding the possibility, obligation of the TFS for the preliminary ruling to the CJEU, it is noted that the effectiveness of the judicial control of the TFS does not include a judicial body of a third state. Switzerland became part of the EU, thus reiterating the prediction that the competition between courts of the Member States which deal with sports disputes exclusively only at the CAS will not be suitable to resolve the problem of the dispute brought before the arbitration body. Within this context, the solution will be to transfer the registered office of TAS to one of the territories of the EU. On the other hand, the CJEU showed that the relevant ruling did not concern the exclusive competence of the CAS to hear the decisions of the ISU relating to the control of the awards that are pronounced at the CAS and the review of the decisions of the ISU before the TFS where in paragraph 194 of the CJEU

in the ISU case is affirmed that:

“(...) in absence of effective judicial control in the sense specified above, it is the use of an arbitration mechanism in its entirety (TAS + TFS) that ends up jeopardizing the protection of the rights that the subjects derive from the direct effectiveness of Union law and effective compliance with Articles 101 and 102 TFEU (...)”³⁵.

FREE MOVEMENT OF WORKERS AND COMPETITION

The CJEU in the SA Royal Antwerp FC case took a position regarding the compatibility with Articles 101 and 45 TFEU (Blanke, Mangiamelli, 2021) and the UEFA rules on trained footballers (i.e. the Home Grown Players Rule, HGPR) where such players are not more than twenty-five and at least eight are locally-trained players. From these eight players only four are part of the club-trained players and those remaining are players trained by another club that is part of the same sports federation as the club as association-trained players. In the same case Art. 45 TFEU is taken into consideration according to the rules of the Belgian Football

³⁵CJEU, C-124/21 P, International Skating Union v. Commission, op. cit.

Federation (URBSFA) where the teams speak for professional football and which participate in division 1st and 1B championships thus having a club full of players of twenty-five people of which at least eight are part of a Belgian team. The Advocate General Szpunar stated in this regard: “as requested by the Court”.

In the SA Royal Antwerp FC case there are issues that concern the applicability of European regulations and sporting activity according to Art. 165 TFEU. The non-applicability of the jurisprudence in cases: Wouters/Meca-Medina/OTOC arrived from the relevant restrictions. The CJEU took the same position as we have seen in the cases: Super League, ISU. These are issues where the CJEU deals with and puts the Belgian judge to a referral where as assessment tasks are the factors, the circumstances which are also taken into consideration by the national judge.

Regarding the possibility of rules coming from UEFA and the Belgian Football Federation (URBSFA) on the relevant players who are trained locally and competition “by object” the CJEU took a position affirming that:

“(…)

- a) taking into account the specificity of the “products” which constitute, from an economic point of

view, sports competitions, sports federations are entitled to adopt rules relating (...) to the organization of competitions, their correct functioning and the participation of athletes in such competitions; b) the specific characteristics of professional football and the economic activities that give rise to the exercise of this sport suggest that it is legitimate that associations such as UEFA and URBSFA can also regulate the conditions under which professional football clubs can form their roster of teams participating in inter-club competitions; c) the real conditions that characterize the functioning of the market of professional football competitions explain justify the fact that the rules adopted by UEFA and URBSFA relating to the organization and correct functioning of the competitions can continue to refer to certain points and to a certain extent, also to national requirements or criteria (...). This sport is characterized by the coexistence of competitions between clubs and competitions and between teams representing national football federations, the composition of which can legitimately be subject to compliance with "clauses of nationality" due to the specific nature of such consignments; (d) as regards the result that the rules on locally trained players objectively aim to achieve from a competitive point of view, it appears from the statements

of the referring court that those rules limit or control one of the essential parameters of economic competition between professional football clubs, i.e. the recruitment of talented players, whatever the club or place in which they were trained, who can allow their team to win in the clash against the opposing team (...) appears likely to affect the competition that the clubs can exercise, not only in the upstream market, consisting of the recruitment of players, but also in the downstream market, consisting of football competitions between clubs (...)"³⁶.

The CJEU sent the referring judge to establish that the rules are of the same nature, prejudicial to competition and only in this way can be qualified and restricted by object. Within this context the CJEU had to:

"(...) a) take into account whether and to what extent such rules limit the access of professional football clubs to the resources essential for success, i.e. already trained players, by requiring them to recruit a minimum number of nationally trained players, to the detriment of the cross-border competition they could otherwise engage in by recruiting players trained within other national football associations; b) evaluate the economic and legal

³⁶CJEU, C-600/23, Royal Football Club Seraing v. FIFA, UEFA e URBSFA Royal Football Club Seraing v. FIFA, UEFA and URBSFA, op. cit.

context in which the rules on locally trained players are inserted together with the specific characteristics of football, also evaluating whether or not the adoption of such rules has the objective of limiting the clubs' access to already trained players, to compartmentalize markets according to national borders or to make the penetration of national markets more difficult by establishing a form of "national preference" (...)"³⁷.

As regards the possibility of returning to rules where players are trained to prohibit and according to Art. 101, par. 1 TFEU and through the application of Art. 101, par. 3 TFEU (Blanke, Mangiamelli, 2021) the CJEU recalled the conditions that are foreseen pursuant to these rules and the methods where the individual case demonstrates that these conditions are satisfied where in the individual case it is demonstrated that the conditions are satisfied and the CJEU follows the considerations that are in favor of the national judge.

The CJEU has taken into consideration that the rules on players who are trained locally can be recruited by football clubs of a professional nature and also train young

³⁷CJEU, C-600/23, Royal Football Club Seraing v. FIFA, UEFA e URBSFA Royal Football Club Seraing v. FIFA, UEFA and URBSFA, op. cit.

footballers who have increased competition through the relevant training steps. This is how the effectiveness, scope and efficiency of such standards are assessed in terms of training where the possibility of efficiency compensates for the competitive disadvantages of this type of standards.

The judge who takes part in a preliminary ruling ascertains the market that is mainly interested in the recruitment of players by football clubs. These rules produce favorable effects for the players and the clubs as a whole as well as for the spectators and viewers who work in favor of the categories of each club they represent and to the detriment of all kinds to the others.

The preliminary ruling judge establishes alternative measures where the training requirements of the players grant professional football club licenses and which establishes financing mechanisms or incentives that are aimed at small training clubs and a total system for the club's costs of training that constitute EU law as restrictive measures for competition.

The minimum number of players who are trained locally compared to the total number of players who are present allows the CJEU to take into consideration the minimum

number of players who are trained locally by including in the competitions a total number of players who are also present to the relevant report. The CJEU considers and explains to the national judge that this type of comparison, even possible, is compared to a situation resulting from the restrictions of competition and that the market situation for competition does not prevent, limit or distort this type of market and the related restrictions thus attributing the relevant rules and applying competitions between clubs and how they are regulated between UEFA and the URBSFA as well as to professional football clubs and their players participating in competitions which are not decisive as elements of associations which are endowed with territorial jurisdiction to a regular power subject to businesses associated with persons who are affiliated.

Also according to Art. 45 TFEU the CJEU has taken into consideration that the rule of the URBSFA relating to players who are trained locally is likely to give a disadvantage to professional footballers who wish to carry on an economic activity in the territory of a Member State other than their own Member State of origin and which do not satisfy the conditions required by this rule. This is not a

criterion of nationality, residence but a basic rule where the connection has a national character by defining that the players who are trained locally are those who are trained according to the Belgian club and these rules of professional football are part of to the participation in football competitions of a club that is part of the URBSFA to include in its lists players with a minimum number of players who satisfy the relevant conditions for this title. This limits the possibility for players to make use of this type of connection. The nationality requirement included in the list of players of that club should reflect the rule of the URBSFA on players who are trained locally and that the principle of free movement of workers can control a preliminary ruling.

Within this context, the CJEU stated for the national judges that:

“(...) taking into account both the social and educational function of sport, recognized by Art. 165 TFEU, and, more generally, of the considerable importance of sport in the European Union, the objective of promoting the recruitment and training of young professional footballers constitutes a legitimate objective of public interest; b) such an objective can justify measures which,

without being conceived in such a way as to guarantee, in a certain and quantifiable way in advance, an increase or intensification of the recruitment and training of young footballers, can, however, create real and significant incentives in that direction; c) to the extent that the URBSFA rule on locally trained players requires professional football clubs that intend to participate in inter-club football competitions governed by that association to register a player in the list of their players and to include in the match report a minimum number of young footballers trained by any club belonging to that federation, its suitability to guarantee the achievement of the aim of promoting the recruitment and training of young footballers at local level must be assessed in light of the following factors: d) by placing all young players trained by a club affiliated to the Belgian national football federation on the same level, the rule may not constitute a real and significant incentive for some of these clubs, in particular those with considerable financial resources, to sign young players with the objective of training themselves (...) recruitment and training policy, which is expensive, time-consuming and uncertain, is placed on the same level as the recruitment of young players already trained by any other club also affiliated to that association, regardless of the location of that other club

within the territorial jurisdiction of that association (...) are precisely local investments in the training of young footballers, in particular when they are made by small clubs, possibly in partnership with other clubs of the same region and possibly with a cross-border dimension, which contribute to achieving the objectives underlying the social and educational function of sport; e) the necessary and proportionate nature of the rule in question and, in particular, of the minimum number of locally trained players who must be registered in the club's player list and included in the match scoresheet compared to the total number of players who must be included therein (...)"³⁸.

Finally, the CJEU according to Art. 45 TFEU has precluded a rule such as that of the URBSFA on players who are trained at local level unless it is established that this rule is suitable to coherently guarantee local objectives such as the recruitment, training of professional football players and where it is necessary to achieve this type of final purpose.

³⁸CJEU, C-600/23, Royal Football Club Seraing v. FIFA, UEFA e URBSFA Royal Football Club Seraing v. FIFA, UEFA and URBSFA, op. cit.

CONCLUSIONS

What we understood from the three sentences above is that the competition rules and the free movement of people are still topics being discussed in a particular way by the CJEU. Until now we have noticed that these are topics that are addressed autonomously, only in our case in collaboration with the subject of sport and the athletes. The important aspects that unite the three rulings focus on purely sporting rules, on preliminary rulings as well as on the interpretation of Art. 165 TFEU which was called in an unorthodox way according to the conclusions of the Advocate General Rantos. On the other hand, the restrictions by object are well exposed as are the obligation and possibility for preliminary rulings according to Art. 267 TFEU to be part of the judicial body that verified the compatibility with arbitration awards and European competition rules as a condition for the protection of rights that are attributed to EU law and according to the effectiveness of a judicial body. The time is not so ripe to see historic sentences in the sports sector. Perhaps there are many political and economic interests and tensions at

an international level, so the principles and values of the EU provide food for discussion but not a precise reality for sentences that bring forward the integration of the EU also in this matter.

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